IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH.

Crl. Appeal No.1083-SB of 2002
Date of Decision: 24.1.2007

Sunder son of Ramjan.

..... Appellant.

Versus

State of Haryana.

..... Respondent.

CORAM: Hon'ble Mr.Justice Mahesh Grover

....

Present: Shri Vivek Singla, Advocate for the appellant.
Shri S.K.Hooda, Senior Deputy Advocate General, Haryana.

....

Mahesh Grover,J.

This is an appeal directed against the judgment dated 14.6.2002 and order of sentence dated 15.6.2002 whereby the Additional Sessions Judge, Gurgaon (hereinafter described as `the trial Court') convicted and sentenced the appellant to undergo rigorous imprisonment for five years and to pay a fine of Rs.1000/- and in default thereof, to further undergo rigorous imprisonment for one month for an offence punishable under Section 366-A of the Indian Penal Code (for short, `the I.P.C.') and to undergo rigorous imprisonment for a period of ten years and to pay a fine of Rs.2000/- and in default of payment of fine, to further undergo rigorous imprisonment for two months for an offence punishable under section 376 of the I.P.C. The

substantive sentences were ordered to run concurrently.

The case of the prosecution was initiated vide F.I.R.No.114 dated 3.6.2001 under Sections 366-A and 376 of the I.P.C. registered at Police Station, Punhana on the basis of the statement of the complainant-Ramjan (PW9). It was stated by him that he was running a bangles shop on the pavement in front of the shop of Ayub Bisarti, resident of Ghagas, near Jamalgarh turning at Punhana. On 2.6.2001, he had gone to his in-laws house at Nagina and his wife and daughter Afsana, aged about 7 years (hereinafter described as `the prosecutrix') were at the shop. At about 6.00 P.M., his wife Aakhtari, after closing the shop, had gone back to the house. He had returned to his house at about 7.00 P.M. He enquired from his wife about the prosecutrix. She disclosed that the prosecutrix had been sent to make the payment of tea bills at the shop of Ramji Lal Saini (PW10) and had not returned so far from there. The absence of the prosecutrix was assumed to be for the reason that she might be playing with some other children. At about 8.00 P.M., the prosecutrix came to the house weeping. She was scared and her salwar and Frock were stained with blood. She could not explain any thing due to fear. The next day, he and his wife enquired from their daughter and then she stated that on the last evening when she was returning from the shop of PW10, the appellant met her on the tap near the chowk in front of Masjid and took her at a lonely place near the Grain Market by alluring her on the pretext of giving something. Thereafter, he opened the string of her slawar, placed her in his lap and after gagging her mouth with his one hand, committed rape upon her as a result of which she started bleeding from her private parts. After making some enquiries about the facts at their own level, it was disclosed by PW10

that on the fateful evening, he had seen the appellant following the prosecutrix. The matter was then reported to the police, who registered the F.I.R. for an offence punishable under Section 376 of the I.P.C.

The trial Court framed a charge under Sections 366-A and 376 of the I.P.C. to which the appellant pleaded not guilty and claimed trial.

The prosecution, in order to bring home the guilt of the appellant, examined PW1- Suresh Kumar, H.C.; PW2- Ajit Singh,Constable; PW3- Balbir Singh, S.I.; PW4- Dr.Lal Singh; PW5- Dr. B.B.Aggarwal; PW6- Sahi Ram, A.S.I.; PW7- Sarwan Kumar, Draftsman; PW8- Pappu Singh,Constable; PW9- Ramjan; PW10-Ramji Lal; PW11- Akhtari; PW12-Afsana, prosecutrix; PW13- ASI Manphool Singh and PW14-Dr. Santosh Jain.

Thereafter, the appellant was examined under Section 313 of the Code of Criminal Procedure,1973. He pleaded total denial and false implication. However, he did not lead any defence evidence.

The trial Court, after examining the evidence, oral as well as documentary, on record, convicted and sentenced the appellant in the manner noticed hereinabove.

Shri Vivek Singla, learned counsel for the appellant has contended at the out-set that the medical testimony coupled with the testimony of the prosecutrix herself belies the story of the rape as put forward by the prosecution. He referred to the statement of PW14-Dr.Santosh Jain, who had medically examined the prosecutrix and observed as under:-

> "On exmaination of face, no external injury was seen. On examination of chest, no external injury was seen. On

examination of abdomen no external injury was seen. On external examination of vaginal pubic hair were not present on the pubis as the patient was under age. No semen was seen on the pubis. Labia majora and minora present according to age. On internal examination of vaginal -per vaginal finding – ring finger entered tightly into vaginal orifice. Bleeding was present, slightly tear vaginal orifice."

PW14 went on to opine that the prosecutrix had not been subjected to any sexual inter-course.

In view of the above medical testimony, learned counsel for the appellant argued that the appellant deserved acquittal.

On the other hand, learned counsel for the State contended that the age of the prosecutrix was merely seven years and that was established by way of medical evidence on record. Besides this, the prosecutrix in her statement as PW12 had identified the appellant and there was no animosity to involve him falsely in the instant case.

I have heard learned counsel for the parties and have perused the record.

To establish the offence of rape, medical testimony coupled with the testimony of the prosecutrix has to be examined in its totality. The perusal of the statement of PW12, the prosecutrix, reveals that the appellant had not removed his clothes which cast a serious aspersion on the narration of the events unfolding and leading to the commission of the offence. In cross-examination, PW12 has also testified that she had been tutored by her lawyer to make a statement in accordance with his directives.

Be that as it may, the statement has to be taken in its totality.

On the one hand, the prosecutrix has alleged rape, but at the same time, the innocence of the child is reflected from her statement when she testifies that the appellant had not taken off his clothes and had never became naked before her.

The afore-stated fact coupled with the medical testimony which categorically rules out the prosecutrix having been subjected to any sexual inter-course belies the entire prosecution story. Bleeding and injury to the private part have been explained by PW14, who has stated, in her cross-examination, that the same may be due to fall and also due to some blunt object, like stone. No marks of injuries were found on labia majora and labia minora and no semen was found on the pubis and after examining the F.S.L. report, PW14 had categorically ruled out the factum of rape having been committed upon the prosecutrix.

The learned trial Court had discarded the above testimony by substituting its own opinion without any cogent reasons. The findings are clearly erroneous and not tenable.

In view of the above, it is held that the prosecution has failed to establish that the appellant had committed an offence punishable under Section 376 of the I.P.C.

In so far as the commission of offence under Section 366-A of the I.P.C. by the appellant is concerned, there is evidence in the form of testimony of the prosecutrix herself that she had been allured by the appellant to go with him. PW12 also stated that the appellant had removed her clothes. PW10-Ramji Lal, the Tea Stall Owner, had also testified that he had seen the appellant taking the prosecutrix along with him. The prosecution case is also that the prosecutrix had gone to make the payment

of the tea bills to the Tea Stall Owner. The complete sequence of events reveals that the prosecutrix, who had gone to make payment to PW10, was allured by the appellant with evil intention, but fortunately, for some reasons or the other, his designs could not be completed. The evidence of the prosecutrix, if read in totality, reveals the truth in bits and parts. Being a child of seven years, the prosecutrix has truthfully and innocently brought out the truth in her statement as PW12.

For the reasons stated above, the appeal is partly accepted and the impugned judgment of conviction and order of sentence are modified to the extent that the appellant is acquitted of the charge under Section 376 of the I.P.C. and sentence awarded to him for that offence is set aside, but his conviction and sentence for the offence punishable under Section 366-A of the I.P.C. is maintained.

January 24,2007 (Mahesh Grover)
"SCM" Judge